

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
ROBERT J. PARADIS,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB Nos. 85-182 and
86-70

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

THIS MATTER, the appeals from Department of Ecology Order No. DE 85-564 ordering appellant to cease and desist from further discharge from an artesian well and imposing a \$200 fine came on for hearing before the Pollution Control Hearings Board, Lawrence J. Faulk (presiding), Gayle Rothrock, and Wick Dufford, at a formal hearing in Lacey, Washington, on March 7, 1986.

Appellant represented himself. Respondent Department of Ecology appeared by Allan T. Miller, Jr., Assistant Attorney General. Reporter Nancy A. Miller of Robert H. Lewis and Associates recorded

1 the proceedings.

2 Witnesses were sworn and testified. Exhibits were examined. From
3 testimony heard and exhibits examined, the Board makes these

4 FINDINGS OF FACT

5 I

6 Respondent Washington Department of Ecology (WDOE) is a state
7 agency charged with the allocation and regulation of surface and
8 ground water usage within the state.

10 II

11 Appellant Paradis owns a piece of property in the SW 1/4 SW 1/4 of
12 Section 1, Township 13 N., Range 18 E.W.M., in Yakima County. There
13 is an artesian well located on this piece of property. The instant
14 controversy involves this well.

15 III

16 On February 24, 1983, Mr. Paradis applied for a ground water
17 permit. The WDOE assigned the number G4-28152 to the application.
18 Mr. Paradis applied for a maximum withdrawal rate of 600 gallons per
19 minute, divided as follows: 250 gallons per minute, 13.5 acre feet
20 per year for community domestic supply for a 120 unit RV park; 1 acre
21 foot per year single domestic supply; 3 acre feet per year for a
22 swimming pool and 32 acre feet per year for irrigation of 8 acres from
23 April 1 to October 31; 350 gallons per minute for fire protection as
24 needed.

25
26 Final Findings of Fact,
27 Conclusions of Law & Order
PCHB No. 85-182 and 86-70

IV

On May 16, 1983, Mr. Paradis applied for another ground water permit, in order to improve his instantaneous fire protection capacity. WDOE assigned the number G4-28208 to the application. This application was for 650 gallons per minute; the source was the same artesian well; the overall result sought was the ability to pump 1,000 gpm in a fire emergency.

V

Mr. Paradis proceeded to hire an engineering firm to help him develop his property. The engineering firm led him to believe it was acceptable to drill the well prior to the permits being issued. Consequently, Mr. Paradis hired a well driller to promptly dig the well. Sometime in August, 1983, the well was drilled, and after several water bearing zones were penetrated sufficient pressure was found for surface flow at 1,000 gpm. Problems, however, were encountered in the well construction process, resulting in the appearance of rocks which were washed up the water column and, in Mr. Paradis' view, threatened to plug the well.

VI

A year later in August of 1984, Mr. Paradis opened the well and let the water run continuously for approximately seven days. His purpose was to use the natural artesian pressure to clear the well of obstructions. He feared that failure to let the well flow would result in blockages, requiring a driller to come in and crush rocks clogging the well bore.

Upon learning of this activity, WDOE advised Mr. Paradis that he had allowed more than sufficient flow from the well to accomplish "construction, development, testing or repair" of the well. He was instructed to turn off the well and he complied.

WDOE's inspector testified that later that month Mr. Paradis came into WDOE's office and was then advised that he was not allowed to let the well simply flow unless it was being put to the uses sought in his applications. At that time, the agency had issued findings proposing to approve the applications, but the permits themselves had not been issued.

We find that construction and development of the well were complete by August 1984.

VII

On September 7, 1984, WDOE approved both applications for the withdrawal of ground water from the artesian well. The permits limited the uses to be made of waters from the well to those applied for; namely: community domestic supply, single domestic supply, swimming pool, irrigation and fire protection. In addition, each permit contained the following condition:

Flowing wells shall be so constructed and equipped with valves to ensure that the flow of water can be completely stopped when not being used. Likewise, the well shall be so maintained as to prevent the waste of water through leaking casings, pipes, fittings, valves, or pumps--either above or below land surface.

VIII

WDOE alleges that Mr. Paradis again opened the well to clear it of

Final Findings of Fact,
Conclusions of Law & Order
PCHB No. 85-182 and 86-70 4

1 rocks on July 17, 1985. Mr. and Mrs. Paradis testified that this date
2 is incorrect, but admitted that the well was opened for about 15
3 minutes on July 16, 1985. Both parties agree that the well was opened
4 on July 18, 1985, and water was allowed to run for approximately three
5 hours. A WDOE employee observed both events. On July 18, 1985, Mr.
6 Paradis, contacted eventually by phone, was ordered to shut the well
7 down. Mr. Paradis immediately complied with the WDOE request.

8 While the well was open the water was allowed simply to flow
9 away. It was not put to any of the uses specified in the permits.

10 IX

11 The enforcement personnel at WDOE were under the impression that
12 the well had been left open and allowed to flow for two days.
13 Notwithstanding Mr. Paradis' immediate compliance with the oral
14 shutdown order, the agency staff, reflecting on their experience with
15 him the previous August, decided that vigorous action was needed to
16 get the man's attention. They felt that he had committed a flagrant
17 violation of the terms of his permits.

18 As a consequence, they took the following additional actions:

19 (1) On July 22, 1985, wrote him a letter confirming the shutdown
20 request conveyed by telephone on July 18, 1985, and setting forth both
21 the uses allowed by the permits and the permit condition regarding
22 construction and maintenance.

23 (2) On July 23, 1985, posted his well with a notice indicating
24 that "the controlling works to which this notice is attached has been
25 regulated." The notice cited waste of public ground waters as the

1 reason for posting, and went on to indicate that "you are further
2 ordered to refrain from further discharge of water from the well
3 except as permitted in accordance with permits G4-28152P and
4 G4-28208P."

5 (3) On August 19, 1985, issued a regulatory order which provided,
6 in pertinent part:

7 The Department of Ecology is responsible for
8 the supervision of public waters within the state
9 and their appropriation, diversion (withdrawal),
storage (dam safety), and use.

10 On July 17, 1985, R.J. Paradis opened an
11 artesian well in the SW1/4SW1/4 of Section 1,
Township 13 N., Range 18 E.W.M., in Yakima County.

12 The artesian well was allowed to openly discharge
13 approximately 1,000 gallons per minute, on July 17
14 and 18, 1985 with no permitted beneficial use being
made of the water constituting violation of RCW
90.44.110.

15 (4) Also on August 19, 1985, issued a Notice of Penalty Incurred
16 and Due assessing a civil penalty of \$200 for opening the well and
17 discharging water on July 17 and 18, 1985, "with no permitted
18 beneficial use being made of the water."

19 X

20 Feeling aggrieved by the regulatory order, appellant appealed the
21 order to this Board on September 19, 1985, and it became our number
22 PCHB No. 85-182.

23 On or about August 30, 1985, Mr. Paradis filed an application for
24 relief from the \$200 penalty imposed. On March 18, 1986, WDOE
25 affirmed the \$200 penalty. On April 12, 1986 appellant appealed the
26 Final Findings of Fact,
27 Conclusions of Law & Order
PCHB No. 85-182 and 86-70

1 fine to this Board and it became our number PCHB No. 86-70. At
2 hearing both parties agreed that if WDOE did not grant relief from the
3 penalty and Mr. Paradis appealed that decision to this Board, the
4 record in PCHB No. 85-182 would stand as the record in PCHB No. 86-70,
5 eliminating the need for repetition of testimony.

6 XI

7 Mr. Paradis testified that there is no development on the property
8 at the present time and that therefore the well is not now and never
9 has been in continuous operation. He has had practical experience
10 over at least thirty years with the development of artesian wells. He
11 has had success locating well sites by "witching."

12 In his opinion, the well needs to be opened up periodically to
13 prevent clogging and to maintain pressure until it can be put into
14 continuous operation. He regards the periodic opening of the well as
15 testing or maintenance and argues that such action is not the waste of
16 water.

17 Letting the rocks get washed out occasionally, he believes, will
18 alleviate the need for him to incur the eventual expense of hiring a
19 well driller to clean the whole thing out. Finally, he indicated
20 that, in the future, he will request WDOE's approval prior to opening
21 the well and letting the water gush out on the ground. Since July 18,
22 1985, the well has remained shut off.

23 XII

24 WDOE's expert on artesian well development testified that there is
25 no necessity for allowing artesian wells to flow extensively after

1 construction is complete and that wells not in continuous use do not
2 require periodic flushing as a matter of proper testing or
3 maintenance. On being informed of the facts concerning the well in
4 question, his opinion was that such flushing is unnecessary in this
5 case.

6 XIII

7 The testimony is in conflict. We were, however, finally
8 unpersuaded that the periodic flushing of this otherwise shut-off
9 artesian well is reasonably required for testing or maintenance of the
10 well. The eventual expense which Mr. Paradis fears is, we find, more
11 speculative than certain.

12 XIV

13 Any Conclusion of Law which is deemed a Finding of Fact is hereby
14 adopted as such.

15 From these Findings of Fact, the Board comes to these

16 CONCLUSIONS OF LAW

17 I

18 The groundwater code, Chapter 90.44 RCW, was enacted in 1945.
19 RCW 90.44.110 in pertinent part, reads as follows:

20 No public ground waters that have been withdrawn
21 shall be wasted without economical beneficial use
22 ...

23 provided, however, That the withdrawal of
24 reasonable quantities of public ground water in
connection with the construction, development,
testing, or repair of a well shall not be construed
as waste; (Emphasis added)

25 II

26 Authorized uses of public ground waters are those specified in
27

1 state-issued permits. See RCW 90.44.060, 90.03.250, 90.03.290. The
2 latter section states that when all criteria of issuance have been
3 satisfied, WDOE

4 shall issue a permit stating the amount of water to
5 which the applicant shall be entitled and the
6 beneficial use or uses to which it may be applied.
(Emphasis added.)

7 Implicitly the appropriation scheme allows a certain amount of
8 water to be used in the process of development and maintenance of the
9 physical works created in connection with withdrawing ground water.
10 RCW 90.44.080.

11 However, beyond a reasonable amount for such purposes, the use or
12 uses of water are strictly limited to those listed in permits.

13 III

14 We have found that the construction and development of the well in
15 question was complete by 1984. We likewise have found no need for
16 testing or maintenance of the well through periodic flushing
17 thereafter. We construe maintenance as included within the statutory
18 term "repair."

19 Accordingly, we conclude that the discharges of water which
20 occurred at the Paradis' well on July 16 and 18, 1986, were not "the
21 withdrawal of reasonable quantities of public ground water in
22 connection with construction, development, testing or repair of a
23 well."

24 Moreover, we have found no economic necessity in Mr. Paradis'
25 flushing program. We conclude, therefore, that the discharges which

26 Final Findings of Fact,
27 Conclusions of Law & Order
PCHB No. 85-182 and 86-70

1 occurred constituted the waste of public ground water without
2 "economical beneficial use."

3 IV

4 The Legislature has given the Department of Ecology the job of
5 regulating the use of public waters, as well as the job of issuing
6 permits. RCW 43.21.130(1).

7 One of the legislatively created tools for carrying out this
8 function is the regulatory order. RCW 43.27A.190 states in pertinent
9 part:

10 Notwithstanding and in addition to any other powers
11 granted to the department . . . whenever it appears
12 . . . that a person is violating or is about to
violate any of the provisions of the following:

13 (1) Chapter 90.03 RCW; or

14 (2) Chapter 90.44 RCW; or

15 . . .

16 (6) Any other chapter or statute the director
17 . . . is charged with administering . . . the
18 director . . . or an authorized assistant, may
19 cause a written regulatory order to be served upon
20 said person The order shall specify the
21 provision of the statute, rule, regulation,
22 directive or order alleged to be or about to be
23 violated and the facts upon which the conclusion of
24 violation or potential violation is based, and
25 shall order the act constituting the violation or
26 potential violation to cease and desist or, in
27 appropriate cases, shall order necessary corrective
action to be taken with regard to such acts within
a specific and reasonable time. (Emphasis added.)

23 V

24 Mr. Paradis' actions are subject to regulation by regulatory order
25 only if he is violating or about to violate the law. On August 19,

26 Final Findings of Fact,
27 Conclusions of Law & Order
PCHB No. 85-182 and 86-70

1 1985, when the regulatory order under appeal was written he had long
2 since ceased any violation. He shut off the well immediately on being
3 told to do so orally on July 18, 1985.

4 Therefore, the cease and desist order in question can only be
5 justified if it is reasonable to conclude that the some further
6 violation was imminent. We do not believe that the record supports
7 such a conclusion. A month had elapsed during which there is no
8 evidence of any move on Mr. Paradis' part to open the well. All the
9 record shows is that he complied with WDOE's initial oral order to
10 stop discharging and, then--before the regulatory order was
11 issued--received a letter, and a notice of posting, both telling him
12 to do what he had already done.

13 VI

14 Another of the Legislatively created tools for regulating the use
15 of public ground waters is the civil penalty. RCW 43.83B.335 states,
16 in pertinent part:

17 The power is granted to the department of ecology
18 to levy civil penalties of up to one hundred
19 dollars per day for violation of any of the
20 provisions of this chapter and chapters 90.03,
21 90.22, and 90.44 RCW, and rules, permits, and
22 similar documents and regulatory orders of the
23 department of ecology adopted or issued pursuant to
24 such chapters.

22 VII

23 Our Conclusion No. III above is a conclusion that RCW 90.44.110
24 was violated by Mr. Paradis actions on July 16 and July 18, 1985.

25 Although WDOE's penalty notice listed the wrong day for the initial

26 Final Findings of Fact,
27 Conclusions of Law & Order
PCHB No. 85-182 and 86-70

1 wrongful discharge, we deem the pleadings to be amended to conform to
2 the proof and, thus, this mistake is without any legal consequence.

3 Our remaining task, then, is to determine whether the penalty
4 assessed is reasonable. It is not the function of a penalty to
5 compensate the public for a tangible loss. The purpose is primarily
6 to influence the behavior of the perpetrator and to deter violations
7 generally.

8 Here the specific deterrence objective seems to have been
9 accomplished. The WDOE undoubtedly has succeeded in getting Mr.
10 Paradis' attention. He has disavowed any intention of flushing his
11 well again unless WDOE tells him that he can. The major remaining
12 effect of assessing a penalty, therefore, is as a caution to others
13 who may be tempted similarly to open flowing wells without putting the
14 water to any permitted beneficial use. We think the aims of the
15 statute will be appropriately served by the Order set forth below.

16 IX

17 Any Finding of Fact which should be deemed a Conclusion of Law is
18 hereby adopted as such.

19 From these Conclusions, the Board enters this
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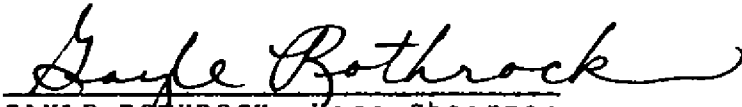
ORDER

Department of Ecology Regulatory Order No. 85-564 is reversed.
The Civil Penalty is confirmed in the amount of \$100; the remaining
\$100 is suspended on condition that appellant not violate RCW
90.44.110 for one year from the date of this Order.

DATED this 9th day of May, 1986.

POLLUTION CONTROL HEARINGS BOARD

 5/9/86
LAWRENCE J. FAULK, Chairman


GAYLE ROTHROCK, Vice Chairman


WICK DUFFORD, Lawyer Member